

Federal Court



Cour fédérale

Date: 20190528

Docket: T-1673-17

Citation: 2019 FC 749

Ottawa, Ontario, May 28, 2019

PRESENT: Mr. Justice Phelan

PROPOSED CLASS PROCEEDING

BETWEEN:

**CHERYL TILLER, MARY ELLEN COPLAND
AND DAYNA ROACH**

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

INTERIM ORDER AND REASONS

I. Introduction

[1] This is a motion on consent for certification of a class proceeding for settlement purposes, approval of the Notice of Certification and Settlement Approval Hearing, and approval of the Notice Plan, pursuant to Part 5.1 of the *Federal Courts Rules*, SOR/98-106 [Rules],

governing class actions. In addition, the Plaintiffs ask for an order requiring Canada to release information about potential Class Members to those companies administering the Notice, the Assessor, and the Class Administrator.

[2] The Court is not prepared to issue its order with respect to certification until the parties have had an opportunity to consider and to make further submissions as indicated herein.

II. Background

[3] In *Merlo v Canada*, 2017 FC 51, 276 ACWS (3d) 281 [*Merlo*], the Federal Court certified a class action for the purpose of settlement in respect of female members of the Royal Canadian Mounted Police [RCMP] who experienced harassment during their term of service with the RCMP. The settlement was subsequently approved in *Merlo v Canada*, 2017 FC 533, 281 ACWS (3d) 702.

[4] This proposed class action seeks to settle with females who were not members of the RCMP but who experienced the same types of harassment in similar circumstances as the class members in *Merlo*. The challenge has been that this group of non-RCMP people is diverse, ranging from those working in a detachment to those who volunteered for activities which included some form of RCMP involvement.

[5] The common issue cited is similar to *Merlo* - “Is the Defendant liable to the Class?” - and inherent in the question is the issue of liability to such a broad group with varying degrees of relationships with the RCMP.

[6] The Class definition proposed is:

Primary Class Members: All current and former living municipal employees, regional district employees, employees of non-profit organizations, volunteers, Commissionaires, Supernumerary Special Constables, consultants, contractors, public service employees, students, members of integrated policing units and persons from outside agencies and police forces, and similarly situated individuals, who are female or publicly identify as female and who worked with the RCMP during the Class Period, excluding individuals who are primary class members in *Merlo and Davidson v Her Majesty the Queen*, Federal Court Action Number T-1685-16 and class members in *Ross, Roy, and Satalic v Her Majesty the Queen*, Federal Court Action Number T-370-17 or *Association des membres de la police montée du Québec inc., Gaétan Delisle, Dupuis, Paul, Lachance, Marc v HMTQ*, Quebec Superior Court Number 500-06-000820-163. The Class Period is September 16, 1974 to the date the Settlement receives Court approval.

Secondary Class Members: All persons who have a derivative claim, in accordance with applicable family law legislation, arising from a family relationship with a Primary Class Member.

[7] The motion also includes a request, firstly, for an order requiring Canada to produce a list of potential Primary Class Members who have had a HRMIS ID with the RCMP. The purpose of such information is to assist with the provision of notice to Class Members.

[8] Secondly, a further order is requested for Canada to produce a list of Primary Class Members who have been paid through some other process for similar harassment pleaded in the claim. This information is to assist with determining a claimant's entitlement to compensation.

III. Pending Matters

[9] In terms of the Class definition, the parties have struggled to arrive at a meaningful description of the group. The groups described are extremely diverse, and had dealings with the RCMP under varying circumstances. There appears to be no commonality of relationship within the groups and the RCMP.

[10] The Class definition would appear to be insufficiently defined and thus the common issue is overbroad.

[11] In establishing an identifiable class, this Court in *Paradis Honey Ltd v Canada*, 2017 FC 199 at paras 23-24, [2018] 1 FCR 275, citing the Supreme Court of Canada in *Hollick v Metropolitan Toronto (Municipality)*, 2001 SCC 68 at paras 17-20, [2001] 3 SCR 158, identified the existence of three elements to be met: (1) the class must be defined by objective criteria; (2) the class must be defined without reference to the merits of the action; and (3) there must be a rational connection between the common issues and the proposed class definition. It must be shown that the class is defined sufficiently narrowly so as to meet these elements.

[12] The Court recognizes that this is a case of certification for settlement and that, consistent with such authorities as *Merlo, Garipey v Shell Oil Co*, 2002 OJ No 4022 at para 27, 117 ACWS (3d) 690 (Sup Ct J), and arguably *Bona Foods Ltd v Ajinomoto USA Inc*, [2004] OJ No 908, 129 ACWS (3d) 456 (Sup Ct J), the courts generally engage in a less rigorous analysis of the certification criteria.

[13] However, the certification criteria must be met. It is essential to ensure that there is adequate notice to the class, that potential claimants know whether they may be eligible, and that the settlement process is manageable and fairly limits the appropriate class.

[14] In the proposed Class definition the phrase used is “worked with the RCMP” - a term of almost indeterminate breadth. Other materials before the Court use phrases similar to “worked for” or “worked in”, which also have unclear meanings.

[15] The proposed definition also refers to “similarly situated individuals” without describing what that “similar situation” is. There is no apparent requirement that the class member was supervised or managed by a member of the RCMP or worked in an environment controlled by the RCMP.

[16] It appears to the Court that what the parties seek to encompass is the unacceptable conduct which occurred to those working in an RCMP controlled workplace environment. That notion gives some better definition to the phrase “similarly situated”.

[17] Therefore, the parties are to consider a definition that better defines the circumstances including the place of the misconduct.

[18] The Court is reluctant to impose, at this time, a definition in the context of a settlement, where the parties have an agreed view of who should be in the class.

[19] With respect to the lists to be produced, the second list is not necessary, as admitted by counsel, for the approval of certification and the steps to a settlement approval. Under those circumstances the Court would not impose a step which is more properly part of the claim process should the settlement be approved.

[20] Lastly, the Settlement Agreement specifies that if that agreement is not approved or the number of “opt outs” reaches the threshold number, this action is de-certified.

[21] While that may be what the parties wish and may be an inevitable consequence, as discussed below, Rule 334.19 of the *Rules* gives the Court the discretion to de-certify an action on motion where the conditions for certification are no longer satisfied. Rules 334.2 and 334.3 give the Court the exclusive power to allow the action to continue or discontinue the action.

[22] It would be prudent for the parties to better address whether they will seek a motion for decertification potentially on consent in their Settlement Agreement, should the Settlement Agreement not be approved.

IV. Conclusion

[23] Before making a final order on this motion, the Court wishes to afford the parties an opportunity to further consider the issues raised here.

INTERIM ORDER in T-1673-17

THIS COURT ORDERS that the parties may, within 30 days, submit such further representations, materials and amendments (including to the proposed Order) which arise from the motion hearing. There are no costs.

"Michael L. Phelan"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1673-17

STYLE OF CAUSE: CHERYL TILLER, MARY ELLEN COPLAND AND
DAYNA ROACH v HER MAJESTY THE QUEEN

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: MAY 21, 2019

**INTERIM ORDER AND
REASONS:** PHELAN J.

DATED: MAY 28, 2019

APPEARANCES:

Angela Bessflug
Janelle O'Connor
Patrick Higgerty, Q.C.

FOR THE PLAINTIFFS

Donnaree Nygard
Jennifer Chow
Mara Tessier

FOR THE DEFENDANT

SOLICITORS OF RECORD:

Klein Lawyers LLP
Barristers and Solicitors
Vancouver, British Columbia

FOR THE PLAINTIFFS,
CHERYL TILLER AND MARY ELLEN COPLAND

Higgerty Law
Barristers and Solicitors
Calgary, Alberta

FOR THE PLAINTIFF,
DAYNA ROACH

Attorney General of Canada
Vancouver, British Columbia

FOR THE DEFENDANT